79-238

IN THE SUPREME COURT OF THE UNITED STATES

DOROTHY AYLESWORTH
Respondent,

-vs- No.

MUTUAL OF OMAHA INSURANCE COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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-vs-

MUTUAL OF OMAHA INSURANCE COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Mutual of Omaha Insurance Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 22, 1979, rehearing being denied on June 11, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears as Appendix A. The Order denying Petition for Rehearing appears as Appendix B. The transcript of the opinion of the United States District Court for the Eastern District of Michigan, Southern Division, appears as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1979. A timely Petition for Rehearing was denied on June 11, 1979, and this Petition for a Writ of Certiorari is filed within 90 days of that date. Jurisdiction is conferred upon this Court by Title 28, United States Code Section 1254(1).

QUESTION PRESENTED

Did the Court of Appeals, obliged to decide the case in accordance with state law, give Petitioner a proper judicial hearing as required by law when it failed to consider a state supreme court decision defining a contract term the meaning of which the Court of Appeals deemed pivotal, when it assumed the existence of facts beyond what was established by the record in the District Court, and when in arriving at its decision it considered the reputation of the District Judge whose decision was the subject of its review?

STATEMENT OF THE CASE

Robert W. Aylesworth, the deceased insured, was covered for $200,000.00 by a travel accident policy, issued by Petitioner, the pertinent provisions of which are as follows:

PART A

" 'Injuries' " means accidental bodily injuries received while this policy is in force and resulting in loss independently of sickness and other causes and received:

. . . .

"2. AIRPORT PREMISES: AIRPORT BUS AND LIMOUSINE SERVICE—while on any airport premises immediately before boarding or immediately after alighting from an aircraft on which the Insured is covered by this policy; or injuries received while riding as a passenger in an airport bus or limousine provided or arranged for by an airline or the airport authority, but only (a) when going to, or after being at, an airport for the purpose of boarding an aircraft on which the Insured is covered by this policy or (b) when leaving an airport after alighting from such an aircraft.

"3. COMMON CARRIER—while riding as a passenger in, boarding or alighting from any public land, air or water conveyance provided by a common carrier primarily for passenger service."

The widow of the deceased insured brought an action in the United States District Court against Petitioner, Mutual of Omaha Insurance Company. Concessions of fact were made in connection with both parties' motions for summary judgment. It was agreed that the insured was covered by the policy referred to above and that on March 4, 1976, after apparently paying his fare to get into a subway station in Toronto, Ontario, Canada, the insured, who was standing on a subway platform, apparently fell onto the tracks and was killed by a subway train which subsequently pulled into the train station. (A)

The District Court (Charles W. Joiner) granted Respondent's motion for summary judgment, stating that he was basing his decision "primarily and largely" on a Seventh Circuit Court decision, *Ludwig* v. *Massachusetts Mutual Life Insurance Company*, 524 F.2d 376 (CCA 7, 1975), subsequently reversed, *Massachusetts Mutual Life Insurance Company* v. *Ludwig*, 426 U.S. 479 (1976).

The Court of Appeals affirmed the judgment of the District Court. In doing so, it read facts into the case that were never admitted, by stating that the insured "was waiting for his train when he leaned over the edge of the platform presumably to ascertain whether a train was approaching, and fell on the tracks" (2a), and by stating that the term "boarding" include(s) a passenger who has purchased his ticket and is waiting momentarily on the platform to board a subway" (2a).

The District Court did not give any consideration to the term "boarding", since it relied on the Seventh Circuit Court decision in *Ludwig*, which interpreted policy language "while a passenger in or upon a public conveyance", which language did not include the term "boarding" in the policy there involved. The Court of Appeals concluded that the Michigan courts would hold that the insured's death would be comprehended within the term "boarding" as used in the insurance policy. The Court of Appeals further stated that "this conclusion is reinforced by the decisions below of Judges Pratt [who had nothing to do with the instant case] and Joiner, two able and experienced District Judges familiar with the law of the State." (2a)

ARGUMENT

THE COURT OF APPEALS DENIED PETITIONER A REASONABLE JUDICIAL HEARING IN DENYING RELIEF IN ITS APPEAL OF RIGHT.

The Court of Appeals determined that the pivotal word of the insurance contracting was "boarding" (2a). The only decision of the Michigan Supreme Court defining that word is *Formiller* v. *Detroit United Railway*, 164 Mich. 653, 13 N.W. 347 (1911) wherein the Court said at page 660, "Everybody understands that it means getting on the car." The Court of Appeals gave absolutely no consideration to this decision, although it was contained in Petitioner's Brief on appeal. (10a). Rather, it considered *Nickerson* v. *Citizens United Insurance Company*, 393 Mich. 324, 244 N.W. 2d 896 (1975), which considered the definition of the term "occupying", *Quinn* v. *New York Life Insurance Co.*, 224 Mich. 641, 195 N.W. 427 (1923), which involved the contract term "while traveling as a passenger on a street car", and *Ludwig* v. *Massachusetts Mutual Life Insurance Company*, 524 F.2d 376 (1975), a Seventh Circuit decision, regarding Michigan law respecting a contract not containing the word "boarding", written by a Senior United States District Court Judge from Oregon sitting by designation, that was

peremptorily reversed by this Court, *Massachusetts Mutual Life Insurance Company* v. *Ludwig*, 426 U.S. 479 (1976).

By answers to requests for admissions and statements in District Court briefs (6a, 7a), the only agreement of fact made by the parties was that the death of the insured was accidental and that his death occurred when he fell from a subway station platform in Toronto, Ontario, Canada, onto train tracks after apparently paying his fare to get into the subway station, and was struck and killed by a subway train that subsequently pulled into the station.

The Court of Appeals based its decision upon the following claimed facts that were never admitted by stating that the insured "was waiting for his train when he leaned over the edge of the platform, presumably to ascertain whether a train was approaching, and fell on the tracks" (1a) and by stating that the term "boarding" "include(s) a passenger who has purchased his ticket and is waiting momentarily on the platform to board a subway." (2a) Nowhere in the facts available by way of summary judgment was there any admission that the insured was waiting for the train that hit him, or any other train for that matter, nor was there anything by way of proof that established the length of time that the insured was on the platform or that he had any intention of boarding a subway train.

The factual elements of being "momentarily" on the platform, "waiting for his train when he leaned over the edge of the platform, presumably to ascertain whether a train was approaching", were not a valid part of a judicial resolution, but the Court of Appeals gratuitously added them to support its decision that the insured was "boarding" the train, and affirmed a judgment of $200,000.00 against Petitioner as a result.

This case was consolidated on appeal with another case by the same plaintiff against another insurance company, namely *Dorothy Aylesworth* v. *The Travelers Insurance Company*, 77-1433. The District Judge who decided that

case, the Honorable Philip Pratt, gave no reasons for his decision other than to say the insured was a passenger (8a). The instant case was decided in the District Court by the Honorable Charles W. Joiner, who based his decision "primarily and largely" (4a) on the Seventh Circuit decision in *Ludwig* v. *Massachusetts Mutual Life Insurance Company*, supra, subsequently reversed by this Court. The Court of Appeals in deciding the instant case stated that its decision was:

> ". . . reinforced by the decision below of Judges Pratt and Joiner, two able and experienced Michigan District Judges familiar with the law of the State." (2a)

When litigants appeal to a United States Court of Appeals from a final judgment of a United States District Court they do so as a matter of right, 28 U.S.C. 1291, and are entitled to have their controversies resolved by judges giving judicial consideration to the matter.

We submit that any judicial review which, even in part, relies upon the reputation of the judges whose decisions the court is obliged to judge, fails to give fair judicial consideration, for it then becomes a determination of law based upon men and not upon independent judicial reasoning. The reliance of the Court of Appeals, here, upon "two able and experienced Michigan District Judges familiar with the law of the State" is patently without merit, because one of the judges gave no reasons for his decision and the other judge relied "primarily and largely" on the opinion of an Oregon District Court Judge sitting by designation on the Seventh Circuit, which decision was peremptorily reversed by this Court.

We submit that when a appellate court adds facts not a part of the consideration of the decision being reviewed because those facts were beyond any admission or concession made by Petitioner, it is not the giving of judicial consideration or judicial review.

We further submit that when a United States Court of Appeals reviews a diversity case dealing with the interpretation of contract terms under state law, and concludes that a particular term, in this case "boarding", is pivotal, it must consider the only state supreme court decision defining the particular term, particularly if such decision is called to its attention. Failure to consider such a decision and reliance upon state supreme court decisions involving the meaning of other, different terms, is not proper judicial consideration by the Court of Appeals.

This Court, during a time of proliferation of federal administrative tribunals, examined the requirement of fairness for an administrative review hearing within the Department of Agriculture. *Morgan* v. *United States*, 298 U.S. 468 (1936), and 304 U.S. 1 (1938). There, analogy was made to the accepted, traditional understanding of a judicial hearing, and it was held that the substance of judicial fairness must be afforded in administrative, quasi-judicial hearings. In *Morgan* v. *United States*, 298 U.S. 468, 480, this Court, in describing some of the elements of a judicial hearing said:

> "Nothing can be treated as evidence which is not introduced as such . . ., Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not influence the conclusion."

In reasoning as to why administrative agencies with quasi-judicial powers must adhere to accepted concepts of judicial consideration, this Court said in *Morgan* v. *United States*, 304 U.S. 1, 22:

> ". . . if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

When the Court of Appeals considered claimed facts that it read into the case without any basis therefor, it treated as evidence something that was not evidence or a substitute therefor.

When the Court of Appeals resolved that the term "boarding" was pivotal to the case, but refused to consider the decision of the Michigan Supreme Court as to the meaning of that term, it excluded a circumstance that should have been considered.

When the Court of Appeals relied upon the "able and experienced . . . Judges familiar with the law of the State", it considered a circumstance that should not legally influence its decision.

These enumerated failures of the Court of Appeals are materially in conflict with "the cherished judicial tradition embodying the basic concepts of fair play." *Morgan* v. *United States*, 304 U.S. 1, 22.

The *Morgan* cases determined what litigants can expect from administrative agencies by way of procedural due process as guaranteed by Amendment IV to the Constitution of the United States. When this guarantee is measured by traditional concepts of judicial consideration, it must follow that United States Courts are equally obligated to give consideration to disputes that conform to basic concepts of fair play.

When a tribunal manufactures facts without any basis in the record therefor, this is not fair play.

When a tribunal is bound by state law and determines that a particular word of a contract is pivotal, in this case "boarding", and ignores the only state supreme court decision as to the meaning of the pivotal word, this is not fair play.

When the decisions of Federal District Judges are reviewed by a tribunal with a conscious eye on the

reputation of the judges being reviewed, rank is being substituted for principle, and this is not fair play.

This case, on judicial review, was placed upon the summary calendar, *sua sponte*, by the order of the Court of Appeals pursuant to its Rule 7. This calendar is for cases deemed "of such a character as not to justify extended oral argument."

We can appreciate that docket pressures may call for expedited methods of consideration. Docket pressures, however, must not deny historic, accepted standards of judicial consideration on judicial review. Unless these concepts are to be given only lip service, this Court must act to reverse Court of Appeals decisions that reveal an absence of a deliberate consideration under traditional judicial standards, which is the measure of Fourth Amendment due process of law under the Constitution of the United States.

CONCLUSION

WHEREFORE, Petitioner prays that a writ of certiorari be granted and that this Court peremptorily order that this case be reversed and remanded to the United States Court of Appeals for the Sixth Circuit for consideration by a different panel.

Respectfully submitted,

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APPENDIX A

No. 77-1400
No. 77-1433

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DOROTHY AYLESWORTH,
Plaintiff-Appellee,
v.
MUTUAL OF OMAHA, (77-1400)
Defendant-Appellant.
DOROTHY AYLESWORTH,
v.
TRAVELERS INSURANCE COMPANY,
(77-1433)
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 22, 1979.

Before: ENGEL and MERRITT, Circuit Judges; PHILLIPS, Senior Circuit Judge.

PER CURIAM. The defendant insurance companies appeal the orders of District Judges Pratt and Joiner granting summary judgment to the plaintiff in two diversity suits to collect benefits under a policy of accident insurance issued by each of the insurance companies. The insurance contracts, which were entered into in Michigan, provide for benefits if the insured were accidentally killed or injured "while riding . . . as a passenger in or on, or entering [in one of the contracts the word here is "boarding" instead of "entering"] or alighting from a public conveyance . . . provided by a common carrier for passenger service . . . ."

The deceased, plaintiff's husband, was killed when he fell from a Toronto subway platform onto the tracks and was

struck by an oncoming train. He had purchased a ticket to ride the subway and was waiting for his train when he leaned over the edge of the platform, presumably to ascertain whether a train was approaching, and fell onto the tracks.

Plaintiff demanded double indemnity in the amount of $50,000 on one of the policies and $200,000 for the accident on the other, and the companies refused payment. Plaintiff then brought these two suits. After discovery, plaintiff moved for summary judgments contending that the facts are undisputed and clearly establish the liability of the insurors under the policies.

Michigan courts have given broad definition to the term "passenger" as found in similar insurance policies in similar situations where the injured "passenger" no longer had physical contact with, or was waiting for, the conveyance. *See Nickerson* v. *Citizens' Mutual Insurance Co.*, 393 Mich. 324; 224 N.W.2d 896 (1975); *Quinn* v. *New York Life Insurance Co.*, 224 Mich. 641, 195 N.W. 427 (1923). *See also Ludwig* v. *Massachusetts Mutual Life Ins. Co.*, 524 F.2d 376 (7th Cir. 1975) (interpreting Michigan law), *rev'd on other grounds*, 426 U.S. 479 (1976). Our reading of these cases convinces us that Michigan courts would hold that the words "boarding" or "entering a public conveyance" used in these insurance contracts, include a passenger who has purchased his ticket and is waiting momentarily on the platform to board a subway. This conclusion is reinforced by the decision below of Judges Pratt and Joiner, two able and experienced Michigan District Judges familiar with the law of the state.

Accordingly, we hereby affirm the judgments of the District Courts.

APPENDIX B

ORDER

Upon consideration of the Petition for Rehearing filed herein by the Defendant-Appellant, the Court concludes that all of the questions addressed in the Petition for Rehearing were fully considered upon the original submission and decision of this case.

IT IS THEREFORE ORDERED that the Petition for Rehearing be and it is hereby denied.

Entered by the Order of the Court,

JOHN P. HEHMAN, *Clerk*

APPENDIX C
TRANSCRIPT OF OPINION OF THE TRIAL COURT

THE COURT: I'm going to grant the Plaintiff's motion for summary judgment—

MR. HOFFEINS: You're granting Defendant's motion?

THE COURT: Plaintiff's motion.

MR. HOFFEINS: Thank you.

THE COURT: And I'll state the main reasons, if I may first do so, on the record.

I'm not basing it on Judge Pratt's case. I don't know about his case, but, if it has been as indicated, he arrived at the same judgment that I did, independently. It might be even based upon the same analysis.

When you were here before, I sent you back to bring some more facts in this case because I felt that the case was not right for summary judgment. I didn't know what the situation was like so far as how it related to how the subway was running. But, based upon the facts that this is a subway in which you entered the premises after you pay for the transportation by either putting a coin in the slot, or buying a ticket, or something, going in to the subway, and you are on the premises of the subway as a passenger, and you are a passenger all the time. After you put your money in the slot and until you go back and go through the revolving gate that counts you as you get off, I suppose, and I am basing my case, primarily and largely upon Benno P. Ludwig v. Massachusetts Mutual Life Insurance Company, 524 Fed. 2nd, 376, 1975, and I think that case indicates the basic analysis as to why this result is required, and it relies upon Quinn v. New York Life and Rice v. Michigan Railway.

If I can interpret Michigan law correctly, the policy in this case, I think, is really broader than the policy in that

case, and I think leads to conclusions that the motion should be granted. So, if you prepare an order—

MR. ZACK: Your Honor, I have already prepared an order—

THE COURT: Showing that I have—

MR. ZACK: I'll prepare another one.

THE COURT: And make it say that have granted your motion on the grounds stated in open court. If you—I don't know what that is you have there, but, I don't want you to write an opinion or anything. Just do it the way I just asked you do.

MR. ZACK: Thank you.

MR. HOFFEINS: Thank you.

Appendix D

APPENDIX D

REQUESTS FOR ADMISSION

NOW COMES the above named Plaintiff, DOROTHY AYLESWORTH, by and through her attorneys, LIPPITT, HARRISON, PERLOVE, FRIEDMAN & ZACK, and hereby requests that Defendant, Mutual of Omaha, admit the truthfulness of the following statements:

1. That Robert Aylesworth on or about March 4, 1976, was accidentally killed in the City of Toronto, Ontario, Canada.

2. That at the time of Robert Aylesworth's death, the said Robert Aylesworth was riding as a passenger in, boarding or alighting from any public land, air or water conveyance provided by a common carrier primarily for passenger service.

3. That Robert Aylesworth's death falls within the coverage provided and that the amount of Two Hundred Thousand Dollars ($200,000.00) is due and owing.

LIPPITT, HARRISON, PERLOVE,
FRIEDMAN & ZACK

By: (s) Robert C. Zack (P 22676)
Attorney for Plaintiff
18860 West Ten Mile Road
Suite 200
Southfield, Michigan 48075
Telephone: (313) 424-8000

January 10, 1977

ANSWERS TO REQUESTS FOR ADMISSION

NOW COMES the Defendant herein, by Arthur M. Hoffeins, its attorney, and in answer to the Request for Admission filed by the Plaintiff herein says as follows:

1. Admitted.

2. Denied.

3. Denied.

/s/ Arthur M. Hoffeins
Attorney for Defendant
3553 City National Bank Building
Detroit, Michigan 48226
Telephone: (313) 962-6630

Dated: January 24, 1977

APPENDIX E

ORDER FOR SUMMARY JUDGMENT

At a session of said Court, held in the Federal Building, City of Detroit, County of Wayne, State of Michigan on the 26th day of April, 1977.

PRESENT: The Honorable Philip Pratt,
United States District Judge

This matter having come on to be heard with both parties filing briefs and oral argument being held, and the Court being fully advised in the premises,

It is found that Mr. Robert Aylesworth was a passenger when he met his death.

Further, it is found that Michigan Law applies.

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment be and the same is hereby granted.

Philip Pratt
United States District Judge

APPROVED AS TO FORM:

John D. Reseigh (P24801)
Attorney for Defendant

Henry R. Hanssen, *Clerk*

By: /s/ Robert C. Allen
Deputy Clerk

APPENDIX F

EXCERPT FROM BRIEF ON APPEAL TO COURT OF APPEALS

"Boarding" as used in the policy involved in the instant suit cannot be considered in the broad sense of "awaiting to" or "preparing to" board. It is familiar law that insurance policies are to be considered as a whole and interpreted within the four corners of the instrument. *Fire and Marine Insurance Co.* v. *Scott*, 265 Mich. 29 (1933), *Sloan* v. *Phoenix of Hartford Insurance Co.*, 46 Mich. App. 461 (1973). Here, the concept of "awaiting to" or "preparing to" is particularly dealt with in the policy when it deals with coverage regarding airport premises. In this regard the policy says:

. . . .

> 2. AIRPORT PREMISES: AIRPORT BUS AND LIMOUSINE SERVICE—while on any airport premises immediately before boarding, or immediately after alighting from an aircraft on which the Insured is covered by this policy; or injuries received while riding as a passenger in an airport bus or limousine provided or arranged for by an airline or the airport authority, but only (a) when going to, or after being at, an airport for the purpose of boarding an aircraft on which the Insured is covered by this policy or (b) when leaving an airport after alighting from such an aircraft.

. . . .

When dealing with the facts and the appropriate coverage of this case, the above language was not included. There is no such coverage for subway or railroad premises. This clearly shows the intent of having the concept of "waiting to" or "preparing to" board to apply only to airport premises.

Appendix F

Formiller v. *Detroit United Railway*, 164 Mich. 653 (1911) appears to be the only Michigan case interpreting the word "boarding." In that case the plaintiff claimed that he was injured while attempting to get on a street car. The court said (p. 660):

> The term "boarding" the car used by the pleader and counsel and court is certainly not misleading. Everybody understands that it means getting on the car.

IN THE SUPREME COURT OF THE UNITED STATES

DOROTHY AYLESWORTH.
Respondent,

-VS-

No: 79-238

MUTUAL OF OMAHA INSURANCE COMPANY.
Petitioner.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, DOROTHY AYLESWORTH, respectfully prays that Petitioner's Application for a Writ of Certiorari be denied.

QUESTION PRESENTED

Whether the Sixth Circuit Court of Appeals, in reviewing the District Court's order granting Summary Judgment to Respondent, correctly applied the law prevailing in the State of Michigan?

STATEMENT OF THE CASE

Defendant, MUTUAL OF OMAHA INSURANCE COMPANY, issued Robert W. Aylesworth a travel accident insurance policy on November 9, 1975. Mr. Aylesworth named as beneficiary the Plaintiff-Respondent, Dorothy Aylesworth. In pertinent part the policy provides:

> PART A
>
> . . . "Injuries" means accidental bodily injuries received while this policy is in force and resulting in loss independently of sickness and other causes received:
>
> 1) . . .
>
> 2) . . .
>
> 3) COMMON CARRIER—while riding as a passenger in, boarding or alighting from any public land, air or water conveyance provided by a common carrier primarily for passenger service.

On March 4, 1976, while this policy was in full force and effect, the deceased was fatally injured when he fell onto a

rail track and was struck by a subway train in Toronto, Ontario, Canada. Immediately prior to this accident, the deceased was standing close to the edge of the eastbound platform of the Bloor Street West Subway at Bathurst Street near the Markham Street exit. To reach the platform from which he fell, the deceased was first required to pay the prescribed fare collected by the Toronto Transit Commission from all subway users.

Mr. Aylesworth was also the named insured on a similar travel accident insurance policy issued by The Travelers Insurance Company, which claim was paid subsequent to the Sixth Circuit's decision.

Mrs. Aylesworth, the widow and beneficiary, brought actions in the United States District Court for the Eastern District of Michigan against both companies. All parties to both actions filed motions for Summary Judgment. After obtaining additional information at the trial court's request and after the filing of briefs and full oral argument, Respondent's Motion for Summary Judgment (App. C,D) was granted in both of the District Court actions.

In the instant cause the District Court (Charles W. Joiner) stated in its decision granting Respondent's Motion for Summary Judgment that as Plaintiff was a passenger the case of *Ludwig* v *Massachusetts Mutual Life Insurance Company*, 524 F 2d 376 (CCA 7, 1975), subsequently reversed on other grounds, *Massachusetts Mutual Life Insurance Company* v *Ludwig*, 426 US 479 (1976), indicates the basic analysis as to why this result is required, and it relies upon *Quinn* v *New York Life Insurance Company*, 224 Mich 641, 195 N.W. 427 (1923), and *Rice* v *Michigan Railway Co.*, 208 Mich 123, 175 N.W. 454 (1919). Judge Joiner further concludes that the policy in the instant case is broader than that in *Ludwig, supra*, and leads to the conclusions that the motion should be granted. (App. C).

The Court of Appeals affirmed the judgment of the District Court, basing its analysis upon the applicable

Michigan law, and denied Petitioner's request for a re-hearing. (App. A,B).

ARGUMENT

THE COURT OF APPEALS PROPERLY DECIDED THE QUESTION PRESENTED IN LIGHT OF THE APPLICABLE MICHIGAN LAW. THE DECISION OF THE SIXTH CIRCUIT DEMONSTRATES THAT THE COURT FAITHFULLY PERFORMED ITS APPELLATE FUNCTION IN BASING ITS DECISION ON THE LAW PRESENTED BY THE PARTIES.

Petitioner asserts that the three Judges comprising the panel in the Court of Appeals failed to consider a state Supreme Court decision. Petitioner is attempting to convince this Court that the Judges of the Court of Appeals failed to read the briefs of the parties, listen to oral argument and consider the authorities upon which the parties relied. A mere cursory reading of the Sixth Circuit's opinion shows this to be inaccurate. The Sixth Circuit's opinion, together with the cases cited therein, illustrates that the court carefully considered the law, the policy language, the applicable cases and the admitted facts.

Petitioner places great reliance on *Formiller* v *Detroit United Railway*, 164 Mich 653, 130 N.W. 347 (1911). This 1911 case at one point speaks to the meaning of the term "boarding". Nowhere does it attempt to construe the process of "riding as a passenger in, boarding or alighting from any public land, air or water conveyance provided by a common carrier primarily for passenger service", as contained in the policy of insurance. The case also does not attempt to define the entire process of "boarding".

Formiller, at one point, may have accurately represented Michigan law. However, subsequent decisions of the Michigan Supreme Court have enlarged the concept of the term "boarding". The Court of Appeals was undoubtedly aware of the expended state of current Michigan law when it

referred to the opinion of the District Court and cited the case of *Ludwig* v *Massachusetts Mutual Life Insurance Company*, 524 F 2d 376 (CCA 7, 1975), subsequently reversed on other grounds, *Massachusetts Mutual Life Insurance Company* v *Ludwig*, 426 US 479 (1976). (App. A).

Petitioner submits that the Court of Appeals improvidently relied on the reputation of the two District Court Judges before whom the Motions for Summary Judgment were heard. Clearly, the Court of Appeals relied on the applicable law. The Court of Appeals specifically said that their conclusion was *reinforced* by the decisions of Judges Joiner and Pratt, whose conclusions were based upon the applicable law of the State of Michigan, and who are familiar with the law of the state. (App. A).

An appellate court may adopt the opinion of the trial court as its own when the opinion is contained in the record. 21 CJS Court §219; see also, *Rittenberry* v *Lewis*, 333 F 2d 573 (1964). In fact, a Court of Appeals in a diversity case, should accord great weight to the conclusions of a local judge on questions of local law. *Bergstresen* v *Mitchell*, 577 F 2d 22 (1978); 36 CJS Fed Cts §297(4); *Laster* v *Retail Credit Co.*, 575 F 2d 609 (1978); *Howard* v *Orien*, 555 F 2d 178 (1977).

Petitioner states that Judge Joiner based his decision on *Ludwig, supra*. Petitioner fails to present the entire picture. Judge Joiner also ruled: "I think that case (Ludwig) indicates the basic analysis as to why this result is required, and it relied upon *Quinn* v *New York Life Insurance Co.*, 224 Mich 641, 195 N.W. 427 (1923), and *Rice* v *Michigan Railway Co.*, 208 Mich 123, 175 N.W. 454 (1919)". (App. C).

Both the Judge of the District Court and the Judges of the Court of Appeals recognized that Michigan Courts have expanded certain contractual language beyond the narrow base announced in 1911 in *Formiller, supra*. In *Quinn*, the Michigan Supreme Court stated that the definition of the

applicable phrases found in decisions of a tort nature was to be applied in interpreting its contract meaning:

> Considering the last question, we are unable to see why any distinction should be made between the insurance company as a defendant and the streetcar company. At the time the provision "while traveling as a passenger on a streetcar" etc., was adopted by defendant and made a part of its contract, that phrase had a well-understood meaning in the law, and it is reasonable to suppose that the meaning given to it by the Courts was well understood and considered by Defendant before making it a part of its double liability, and it was well known by both parties when the contract was made that *should the parties afterwards disagree upon the question of liability the courts would probably give the language the same construction they had given it in the cases where transportation companies were defendants.* (emphasis added) *Quinn, supra*, at 643.

This recognition is also apparent in the Seventh Circuit's decision in *Ludwig*, which case interprets Michigan law. In *Ludwig*, the Seventh Circuit ruled that the relationship of carrier-passenger, as defined by Michigan law, begins for insurance purposes, and is defined in the same manner, as in cases where transportation companies are defendants. Citing *Rice, supra*, the Seventh Circuit stated:

> "Counsel has cited Rice, and our independent search reveals no other authority, for the Michigan rule of determining the beginning or commencement of the carrier-passenger relationship. *The factual picture in Rice showed Rice standing on the platform in front of the waiting room with the then intention of boarding an expected streetcar.* At that loading point, it was customary that the streetcars would stop for passengers on being signaled. As a streetcar approached, Rice signaled it to stop by waving his arms. However, the car did not stop and sped by at a

high rate of speed causing Rice in some way by the suction of air to be thrown against the building and injured.

The Supreme Court of Michigan in Rice for the first time answered the question when Rice was constructively a passenger and the defendant owed him a duty as such as follows:

> " 'The relation of carrier and passenger commences when a person with the good faith intention of taking passage, and with the express or implied consent of the carrier, places himself in a situation to avail himself of the facilities for transportation which the carrier offers. In case of a railroad the relation arises not merely when the passenger enters the train with the ticket already purchased, giving him a contract right to ride, but when he enters upon the premises of the carrier, with intention to take a train in due course . . . Those who by express or implied assent are waiting in the passenger room . . . or are crossing the premises of the carrier for the purpose of going on a train or are in the act of mounting the car steps, are passengers, provided their acts are such as are presumed to be known and assented to by the agents of the railroad company having authority in the matter, and regardless of whether or not a ticket has been purchased, if no rule or regulation of the company is being violated.' " (emphasis added). *Ludwig, supra,* at 381.

The Sixth Circuit's opinion further refers to *Nickerson* v *Citizens Mutual Ins. Co.*, 393 Mich 324 (1975). (App. A). In *Nickerson,* the Michigan Supreme Court unequivocally held that the term "occupying" defined in defendant's policy of insurance as "in or upon entering or alighting from" does not require that the insured have physical contact with the vehicle:

> "In sum, the approach to interpretation of the policy language which does not hold 'physical contact' mandatory, appears to be by far the most reasonable and persuasive approach . . .". *Nickerson, supra,* at 331.

The cases of *Rice, Nickerson* and *Ludwig,* tell us that the narrow definition of "boarding" as set forth in *Formiller, supra,* is no longer the law of the State of Michigan. They firmly dictate that the language of the instant insurance policy, "while riding as a passenger in, boarding or alighting from any public land, air or water conveyance provided by a common carrier primarily for passenger service" be afforded a broader meaning than that adopted in 1911 when travel was more restrictive than today. These cases clearly mandate that Michigan, the center of transportation technology, has expanded its legal concepts concerning transportation and travel to encompass the expanded use of the technology for which the state is, in large part, responsible.

Petitioner's assertion that the Court of Appeals failed to consider *Formiller, supra,* and relied upon the reputation of the District Court Judges, is, therefore, without merit as the face of the Sixth Circuit's opinion indicates.

Petitioner further attempts to convince this Court that the Court of Appeals relied upon facts which were never part of the proceedings below. Whether or not the deceased was waiting for a train is irrelevant. It is conceded that the deceased was a passenger. (App. A,C). Therefore, he would still be a passenger even if he acted "from motives of curiosity". *Moffitt* v *Grand Rapids RR Co.*, 228 Mich 349, 353 (1924). It is unimportant whether or not the Sixth Circuit gratuitously stated he "was waiting for his train when he leaned over the edge of the platform, presumable to ascertain whether a train was approaching, . . .". (App. A).

> Where the record does not contain express findings of all material facts involved in the case, *it will be presumed by the court of appeals that the lower court found, in favor of the prevailing party, all the facts necessary for the support of the judgment.* 36 CJS Fed Courts §297 (46).

See also, *U.S.* v *City of Chester, et al,* 114 F 2d 415 (1944).

Therefore, this language of the Sixth Circuit's opinion is not a gratuitous addition. It is the valid product of the court's understanding of its appellate function. It has no bearing upon whether or not the court's decision correctly construed Michigan law.

A concern of the U.S. Supreme Court upon review by certiorari of an appellate court decision is to see that substantial justice is done. 36 CJS Fed Courts §204(17). Petitioner argues that the Sixth Circuit decided this case in conflict with applicable state law. He is absolutely mistaken. Not only did the panel in the Sixth Circuit adhere to the concepts of fair play, they were guided by substantial justice.

The Court of Appeals in its review of the District Court's grant of Summary Judgment is bound by applicable local law. Its statement that:

> "Michigan courts have given broad definition to the term 'passenger' as found in similar insurance policies in similar situations where the injured 'passenger' no longer had physical contact with, or was waiting for, the conveyance. See *Nickerson* v *Citizens Mutual Insurance Co.*, 393 Mich 324, 224 N.W. 2d 896 (1975); *Quinn* v *New York Life Insurance Co.*, 224 Mich 641, 195 N.W. 427 (1923). See also *Ludwig* v *Massachusetts Mutual Life Ins. Co.*, 524 F 2d 376 (7th Cir 1975) (interpreting Michigan law), rev'd on other grounds, 426 U.S. 479, 96 S Ct 2158, 48 L Ed 2d 784 (1976)."

clearly shows that the Court of Appeals reviewed the applicable law and made its decision based thereon. (App. A).

Petitioner has not presented special and important reasons why its Writ of Certiorari should be decided. The Court of Appeals has *not* decided an important state question in a manner in conflict with applicable state law.

CONCLUSION

WHEREFORE, Respondent prays that Petitioner's Application for a Writ of Certiorari be denied and that this Court order the United States Court of Appeals for the Sixth Circuit to issue its mandate.

Respectfully submitted,

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August , 1979

APPENDIX A

No. 77-1400
No. 77-1433

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOROTHY AYLESWORTH,
Plaintiff-Appellee,

v.

MUTUAL OF OMAHA, (77-1400)
Defendant-Appellant.

DOROTHY AYLESWORTH,

v.

TRAVELERS INSURANCE COMPANY,
(77-1433)
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 22, 1979.

Before: ENGEL and MERRITT, Circuit Judges; PHILLIPS, Senior Circuit Judge.

PER CURIAM. The defendant insurance companies appeal the orders of District Judges Pratt and Joiner granting summary judgment to the plaintiff in two diversity suits to collect benefits under a policy of accident insurance issued by each of the insurance companies. The insurance contracts, which were entered into in Michigan, provide for benefits if the insured were accidentally killed or injured "while riding . . . as a passenger in or on, or entering [in one of the contracts the word here is "boarding" insteading of "entering"] or alighting from a public conveyance . . . provided by a common carrier for passenger service . . . ."

The deceased, plaintiff's husband, was killed when he fell from a Toronto subway platform onto the tracks and was struck by an oncoming train. He had purchased a ticket to ride the subway and was waiting for his train when he leaned over the edge of the platform, presumably to ascertain whether a train was approaching, and fell onto the tracks.

Plaintiff demanded double indemnity in the amount of $50,000 on one of the policies and $200,000 for the accident on the other, and the companies refused payment. Plaintiff then brought these two suits. After discovery, plaintiff moved for summary judgments contending that the facts are undisputed and clearly establish the liability of the insurors under the policies.

Michigan courts have given broad definition to the term "passenger" as found in similar insurance policies in similar situations where the injured "passenger" no longer had physical contact with, or was waiting for, the conveyance. *See Nickerson* v. *Citizens' Mutual Insurance Co.*, 393 Mich. 324; 224 N.W.2d 896 (1975); *Quinn* v. *New York Life Insurance Co.*, 224 Mich. 641, 195 N.W. 427 (1923). *See also Ludwig* v. *Massachusetts Mutual Life Ins. Co.*, 524 F.2d 376 (7th Cir. 1975) (interpreting Michigan law), *rev'd on other grounds*, 426 U.S. 479 (1976). Our reading of these cases convinces us that Michigan courts would hold that the words "boarding" or "entering a public conveyance" used in these insurance contracts, include a passenger who has purchased his ticket and is waiting momentarily on the platform to board a subway. This conclusion is reinforced by the decision below of Judges Pratt and Joiner, two able and experienced Michigan District Judges familiar with the law of the state.

Accordingly, we hereby affirm the judgments of the District Courts.

APPENDIX B

ORDER

Upon consideration of the Petition for Rehearing filed herein by the Defendant-Appellant, the Court concludes that all of the questions addressed in the Petition for Rehearing were fully considered upon the original submission and decision of this case.

IT IS THEREFORE ORDERED that the Petition for Rehearing be and it is hereby denied.

Entered by the Order of the Court,

JOHN P. HEHMAN, *Clerk*

APPENDIX C

TRANSCRIPT OF OPINION OF THE TRIAL COURT

THE COURT: I'm going to grant the Plaintiff's motion for summary judgment.

MR. HOFFEINS: You're granting Defendant's motion?

THE COURT: Plaintiff's motion.

MR. HOFFEINS: Thank you.

THE COURT: And I'll state the main reasons, if I may first do so, on the record.

I'm not basing it on Judge Pratt's case. I don't know about his case, but, if it has been as indicated, he arrived at the same judgment that I did, independently. It might be even based upon the same analysis.

When you were here before, I sent you back to bring some more facts in this case because I felt that the case was not right for summary judgment. I didn't know what the situation was like so far as how it related to how the subway was running. But, based upon the facts that this is a subway in which you entered the premises after you pay for the transportation by either putting a coin in the slot, or buying a ticket, or something, going in to the subway, and you are on the premises of the subway as a passenger, and you are a passenger all the time. After you put your money in the slot and until you go back and go through the revolving gate that counts you as you get off, I suppose, and I am basing my case, primarily and largely upon Benno P. Ludwig v. Massachusetts Mutual Life Insurance Company, 524 Fed. 2nd, 376, 1975, and I think that case indicates the basic analysis as to why this result is required, and it relies upon Quinn v. New York Life and Rice v. Michigan Railway.

If I can interpret Michigan law correctly, the policy in this case, I think, is really broader than the policy in that case, and I think leads to conclusions that the motion should be granted. So, if you prepare an order—

MR. ZACK: Your Honor, I have already prepared an order—

THE COURT: Showing that I have—

MR. ZACK: I'll prepare another one.

THE COURT: And make it say that have granted your motion on the grounds stated in open court. If you—I don't know what that is you have there, but, I don't want you to write an opinion or anything. Just do it the way I just asked you do.

MR. ZACK: Thank you.

MR. HOFFEINS: Thank you.

APPENDIX D

ORDER FOR SUMMARY JUDGMENT

At a session of said Court, held in the Federal Building, City of Detroit, County of Wayne, State of Michigan on the 26th day of April, 1977.

PRESENT: The Honorable Philip Pratt,
United States District Judge

This matter having come on to be heard with both parties filing briefs and oral argument being held, and the Court being fully advised in the premises,

It is found that Mr. Robert Aylesworth was a passenger when he met his death.

Further, it is found that Michigan Law applies.

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment be and the same is hereby granted.

Philip Pratt
United States District Judge

APPROVED AS TO FORM:

John D. Reseigh (P24801)
Attorney for Defendant

Henry R. Hanssen, *Clerk*

By: /s/ Robert C. Allen
Deputy Clerk

APPENDIX E

ANSWER TO PLAINTIFF'S INTERROGATORIES

NOW COMES the Defendant herein, MUTUAL OF OMAHA, by ARTHUR M. HOFFEINS, its attorney, and in answer to Interrogatories propounded by the Plaintiff says as follows:

1. Defendant does not know whether ROBERT AYLESWORTH was fatally injured while waiting to board a subway train in Toronto, Ontario, Canada.

a. The information that Defendant has is that ROBERT AYLESWORTH was standing close to the edge of the eastbound platform of the Bloor Street West subway at Bathurst Street near the Markham Street exit in Toronto, Ontario, Canada, and that he apparently lost his balance and fell across the rail nearest to the subway platform, being struck by a train as he lay across the track.

(s) ARTHUR M. HOFFEINS

Dated: December 29, 1976

APPENDIX F

EXCERPTS FROM RESPONDENT'S BRIEF ON APPEAL IN THE SIXTH CIRCUIT

In light of *Rice, supra; Moffit, supra;* and *Quinn, supra,* there is no longer, nor has there been since 1924, a need that the decedent be "in or on" the actual conveyance to be within the parameters of the carrier-passenger relationship. An analysis of the policy language taken as a whole indicates that Defendant, Mutual of Omaha Insurance Company, had knowledge actual or constructive, of the meaning and interpretation applicable to their language and found in the above cited line of cases. To now contend that its policy does not cover those types of occurances is to disregard the express caution of the Court in *Quinn, supra,* that:

> Should the parties afterward disagree upon the question of liability the courts would probably give the language the same construction they had given it in the cases where transportation companies were defendants. *Quinn, supra,* at 643.

APPENDIX G

EXCERPTS FROM RESPONDENT'S BRIEF ON APPEAL IN THE SIXTH CIRCUIT

Defendant's argument that the trial court erred in applying common carrier decisions to the case at bar fails to consider the clear decisions of the courts in *Rice, supra,* and *Ludwig, supra,* which unmistakably hold that common carrier law is to be applied in the interpretation of insurance contract language.

> The trilogy of *Rice* at the beginning of the travel, *Moffit* during the travel, and *Quinn* at the termination of the travel inescapably removes the necessity of a passenger to be "in or upon" the actual car or boat moving the passenger in order to establish or maintain the carrier-passenger relationship. Like the Michigan court in *Quinn,* we "suppose" the Insurer "well understood and considered" the quoted rationale and holding of *Rice, Moffit,* and later *Quinn* as fixing the meaning of while the insured was a passenger in or upon a public conveyance" before making that law "a part of its contract."
>
> *We conclude that Quinn dictates that the Rice rule and test of common carrier-passenger status be applied in determining the commencement of the passenger status of Cane under the accidental provision.* (emphasis added) *Ludwig, supra,* at 382.

IN THE SUPREME COURT OF THE UNITED STATES

MUTUAL OF OMAHA INSURANCE COMPANY,
Petitioner,

-VS-

No: 79-238

DOROTHY AYLESWORTH,
Respondent.

PETITIONER'S REPLY BRIEF

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INDEX TO AUTHORITIES

PETITIONER'S REPLY BRIEF

Several matters related in the Respondent's Response to Petitioner's Petition for Certiorari call for a reply.

We contend that litigants are entitled to consideration from the Court of Appeals that is judicial in nature and that: (1) judicial consideration cannot include the reaching of factual conclusions beyond what is supported by the record; (2) that judicial consideration in diversity cases must include consideration of a state Supreme Court decision regarding the issue the Court of Appeals deemed pivotal in the case; (3) judicial consideration cannot include weighing the reputations and experience of the judges whose decisions are being reviewed.

In his response, counsel for Respondent Dorothy Aylesworth contends that expanding upon the record facts "is the valid product of the court's understanding of its appellate function." (Respondent's Brief, p. 8); and that in ignoring the only Michigan case where the Michigan Supreme Court interpreted the term "boarding" the Court of Appeals "was undoubtedly aware of the expended [sic] state of current Michigan law. . ." (Respondent's Brief, p. 3); and that the Court of Appeals was justified in being "reinforced" by the decisions of two Michigan District Court Judges because "a Court of Appeals in a diversity case, should accord great weight to the conclusions of a local judge on questions of local law." (Respondent's Brief, p. 4)

We believe that Respondent's position regarding a reviewing court's ability to enlarge upon the record facts is, on its face, insupportable.

When a federal court is called upon to apply state case law, and there is no state decision explicitly decisive, we submit that then the federal court must consider a decision that is obviously pertinent. Here one case, *Formiller* v *Detroit United Railway*, 164 Mich 653, 130 N.W. 347 (1911), defined the term "boarding" in a context similar to the situation of the case

at bar. The Court of Appeals gave no evident consideration to this decision but did give consideration to other cases not nearly as analagous. Respondent's relation of cases claimed to be pertinent cannot explain why the most pertinent case of all, from the standpoint of the Court of Appeal's own analysis, was not apparently considered by the Court of Appeals when plainly this case was brought to its attention.

Contrary to Respondent's contention, no Michigan decision subsequent to *Formiller, supra,* has enlarged the concept of the term "boarding" beyond what was contained in that case. *Formiller* represents the only Michigan decision interpreting that term and when that decision received no evident consideration, total consideration given by the Court of Appeals was not equal to the standard of judicial consideration.

Respondent cites three Eighth Circuit cases, *Bergstresen* v *Mitchell,* 577 F. 2d 22 (1978), *Luster* v *Retail Credit Co.,* 575 F. 2d 609 (1978) and *Howard* v *Green,* 555 F. 2d 178 (1977), as standing for the proposition that great weight can be accorded to the decisions of a local judge regarding questions of local law. We would not argue the point if, as in *Bergstresen, Luster* and *Howard,* the local judge fully considered and analyzed Michigan law and gave cogent reasons for his conclusion. But these decisions have no applicability where the local judge, as here, gave no reasons for his conclusion, or relied upon an analysis of local law made by a foreign court whose decision was peremptorily reversed by this Court. *Massachusetts Mutual Life Insurance Co.* v *Ludwig,* 426 U.S. 479 (1976).

A United States Court of Appeals should be entitled to weigh the considered decision of a local judge interpreting local law where the local law is not explicitly decisive. This is not to say that the reputation and experience of a local judge should be weighed where the record demonstrates the local judge's consideration to be only conclusionary or based upon a foreign, reversed analysis of local law. Just as the reputation and experience of a District Court Judge would be of no moment if his decision was contrary to an explicitly decisive

state Supreme Court decision, so also, if a local judge's consideration of local law is based upon a foreign, reversed analysis or is only conclusionary, the reputation of the local judge is of no weight in a "judicial consideration."

Our complaint, here, is that in determining state law on limited, undisputed facts, if proper judicial consideration is given, a Court of Appeals fairly could conclude that the Michigan law leaves Respondent without a chance of recovery. It might so conclude if it had not added outside the record fact conclusions that the deceased insured leaned over the edge of a subway platform to see if a train was coming while he was there but momentarily. It might so conclude if it considered the Michigan Supreme Court decision, *Formiller, supra,* which held that "boarding" "means getting on the car." It might so conclude if it had not been "reinforced" by the reputation and experience of the District Court Judges whose decisions it was obliged to judge.

In short, we are saying that the truncated review of the Court of Appeals, demonstrated by the shortened opportunity at oral presentation and its cursory opinion evidences a failure to consider what should be considered and a weighing of factors not pertinent to a judicial consideration. Thus, the Court of Appeals has denied Petitioner a meaningful opportunity to petition the Federal Judiciary for a redress of its grievances, and denied it a fair, full and rightful judicial hearing as allowed by law, 28 U.S. C. Sec. 1291.

Administrative and legislative decisions can be made without confinement to singular factual circumstances and with reliance on the work of subordinates. Judicial decisions cannot have these elements as a part of their consideration. Docket pressures must not allow the substitution of administrative or legislative consideration for judicial consideration, for what is appropriate for administrative or legislative decisions is not fair regarding the resolution of individual disputes. Consideration of individual disputes by means appropriate to legislation or administration in the trappings of a judicial hearing substitutes gestures of fairness for fairness fundamental to the judicial process.

A peremptory reversal of the decision of the Court of Appeals would demonstrate this Court's concern in maintaining historical judicial fairness in judicial review hearings. Such a decision could have the therapeutic value of establishing that expediency will not be allowed to erode the necessary judicial fairness concepts basic to a system of individual dispute resolution.

This Court demonstrated the necessity for its vigilance in maintaining fundamental fairness in quasi-judicial administrative review proceedings in the two cases of *Morgan* v *United States*, 298 U.S. 468 (1936) and 304 U.S. 1 (1938). Any less vigilance regarding judicial review proceedings would be a denial of substantial justice and would encourage eroding historic fairness concepts as a concession to docket pressures.

CONCLUSION

WHEREFORE, Petitioner prays that a writ of certiorari be granted and that this Court peremptorily order that this case be reversed and remanded to the United States Court of Appeals for the Sixth Circuit for consideration by a different panel.

Respectfully submitted,

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